CONSULTATION PAPER ON ENDURING POWERS OF ATTORNEY

Prepared for the Legislation Working Committee re: Adult Guardianship and the Financial Abuse of Vulnerable Adults by the Law Reform Commission of Saskatchewan

EXECUTIVE SUMMARY:

A person who fears that he or she may become unable to manage their own affairs may grant an enduring power of attorney to a friend, relative or advisor. This person (the attorney) is authorized to act on the grantor's behalf. Enduring powers of attorney have been authorized by law in Saskatchewan since 1983. However, *The Powers of Attorney Act* provides little guidance to grantors or attorneys, and few safeguards against abuse. The Act is typical of "first generation" enduring powers of attorney legislation adopted in Canada.

Since 1983, experience with enduring powers has accumulated in Saskatchewan and elsewhere. Enduring powers have proved to be a useful alternative to court-ordered guardianship in appropriate cases. They fit well with the contemporary emphasis on the "least restrictive alternative" for managing the affairs of individuals with impaired capacity. However, there is also evidence that enduring powers are sometimes abused by unscrupulous attorneys.

Recently, more comprehensive legislation governing enduring powers has been proposed or adopted in several Canadian and Commonwealth jurisdictions. This paper examines proposals from other jurisdictions in the light of Saskatchewan experience with enduring powers.

Recommendations are made to facilitate discussion and consultation, but alternative approaches are also set out in the paper.

ISSUES FOR DISCUSSION

1. Should enduring powers of attorney continue to be permitted in Saskatchewan?

2. What procedures should be required when an enduring power of attorney is signed? For example, who should be qualified to witness an enduring power?

3. Should independent legal advice be required when an enduring power of attorney is granted?

4. Should there be a standard form of enduring power of attorney?

5. Should institutions (such as trust companies and advocacy groups) be eligible to act as attorneys?

6. What should be the statutory obligations of attorneys?

7. Should attorneys be required to submit annual accounts to the Public Trustee, or make some other form of annual filing?

8. Should legislation provide for enduring powers of attorney that take effect only when the grantor is deemed incompetent, and if so, how should incompetence be determined?

9. What authority should the Public Trustee or other officials have to investigate complaints of alleged abuses of powers of attorney?

10. Should powers of attorney be allowed in relation to personal decision-making as well as financial decision-making?

INTRODUCTION

Enduring powers of attorney have become an important option for individuals faced with the prospect that they may become incapable of managing their own affairs. Enduring powers of attorney permit an individual to nominate a friend, advisor, or family member to take responsibility for financial decisions in the event of incompetency. In appropriate cases, it is a private, relatively non-intrusive, and inexpensive alternative to court appointment of a property guardian.

Legislation authorizing enduring powers of attorney, the Saskatchewan *Powers of Attorney Act*, was adopted in 1983. Before the legislation was passed, a power of attorney lapsed if the person who granted it became incompetent. Other Canadian jurisdictions adopted similar legislation at about the same time. Since they were recognized in law, enduring powers have become increasingly popular. However, accumulating experience suggests that enduring powers of attorney legislation is now in need of reform.

On one hand, re-examination of legislation designed to assist vulnerable adults suggests that attention should be given to better integration of enduring powers legislation and guardianship legislation. The enduring power is an option within a continuum of options that extends from informal advice-giving relationships, to full guardianship under court order. Legislation to protect vulnerable adults should recognize the full range of options, encouraging decision-makers to find the best, and least intrusive, arrangement in each case.

On the other hand, while the private, often family-centred, character of the enduring power of attorney is one of its strengths, it also creates a potential for abuse. Experience in Saskatchewan demonstrates that the potential is very real, and that abuse of powers of attorney is often difficult to discover and rectify.

Both the problems and positive benefits associated with enduring powers of attorney have been brought to the public's attention in Saskatchewan by the *Steering Committee on the Abuse of Adults in Vulnerable Circumstances*. As a result of its recommendations, the *Legislation Working Committee re: Adult Guardianship and the Financial Abuse of Vulnerable Adults* was formed. The Committee is an initiative of the Saskatchewan Department of Justice. It includes representatives from the Departments of Justice, Health, and Social Services, the Office of the Public Trustee, the Law Reform Commission, the legal profession, and non-governmental organizations concerned with the problems of vulnerable adults. The Committee has drafted a new Act, *The Adult Guardianship and Co-decision-making Act*, to replace *The Dependent Adults Act*, along with amendments to *The Public Trustee Act*, and is now turning its attention to enduring powers of attorney.

This *Discussion Paper* was prepared by the Saskatchewan Law Reform Commission as part of its contribution to the on-going work of the legislation working committee.

I. THE LEGAL BACKGROUND

1. The nature of powers of attorney

A power of attorney is defined as "an authority whereby one is set in the . . . place of another to act for him."[1] The power is usually conferred in a document signed by the grantor, and is usually witnessed by a third party.[2] The person named to act on the grantor's behalf is called the "attorney"[3].

A power of attorney may be general or specific. A general power of attorney confers authority to do anything the grantor could lawfully have done, at least in regard to the grantor's property and business or financial affairs. Most powers of attorney use standard forms that confer general authority on the attorney. It is possible, however, to limit the attorney's authority to some specific purpose, such as sale of a property on the grantor's behalf.

A power of attorney creates a fiduciary duty that obligates the attorney to act strictly in the interests of the grantor. The scope of this duty will be discussed below, but before the advent of enduring powers of attorney, the most effective practical control of the attorney's actions lay in the authority of the grantor to terminate the power at will, and without any formality. Even an oral revocation of a power is effective.

A power of attorney can only be granted by a person with legal capacity, but there is no capacity test specific to powers of attorney, and little legal authority on the question. It has been suggested that the power is valid if the grantor has legal capacity to do the acts authorized by the document.[4] Thus, for example, if the grantor lacks mental capacity to make an informed decision about sale of real property, a power of attorney that gives authority to sell the grantor's real property is invalid. On the other hand, a person who lacks capacity to appreciate all the implications of a major transaction like sale of a valuable property may nevertheless be competent to make routine decisions about purchases of necessaries, and could grant a power of attorney for that limited purpose.

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[1] *Strouds' Legal Dictionary.*

[2] A witness does not appear to be a strict requirement for an ordinary power of attorney. However, the Saskatchewan *Powers of Attorney Act* requires that an enduring power of attorney must be in writing and witnessed (see below). In practice, ordinary powers of attorney are usually prepared in the form of a deed, and thus are signed and sealed.

[3] The term "attorney" comes from the notion that the person who acts for the grantor "attorns" to the principal in the sense of being responsible to the grantor. The "attorney" need not be a lawyer, of course.

[4] *Gibbons v Wright* (1953) 91 CLR 423. See more generally, the discussion of powers of attorney in *Halsbury's Laws of England* (4th), Vol. I.

It is settled law that an ordinary power of attorney lapses if the grantor becomes incapacitated. In law, the attorney is the grantor's agent. According to *Halsbury's Laws of England,* an agency terminates "where either party becomes incapacitated of continuing a contract by reason of death, bankruptcy, or unsoundness of mind".[5] As a matter of policy, this rule complements the authority of a grantor to revoke a power of attorney. If the grantor loses capacity, he or she would no longer be able to revoke the power, and would therefore lose effective control over the attorney. The rule is intended to protect the grantor's interests by automatically terminating the power upon incapacity.

2. Why enduring powers of attorney legislation was necessary

Ordinary powers of attorney are usually used when it is convenient to have an agent negotiate and close a transaction, or when the grantor is out the country and needs someone to manage affairs. Most ordinary powers are used for limited purposes, and usually do not remain in effect for long periods of time. Issues of capacity and the scope of the attorney's obligations are not often apt to arise in these cases. The rule that a power of attorney lapses if the grantor becomes incapacitated is reasonable in this context, but does create some problems. If the attorney continues to act under the power after it has been terminated by operation of law, he or she may be personally liable. As the Queensland Law Reform Commission observed:

> The revocation of a power of attorney by the subsequent loss of the donor's capacity has serious implications. For example, if as a result of traumatic brain injury or dementia, a person who has granted a power of attorney loses the necessary degree of understanding, the attorney will no longer have any legal authority to make decisions for the donor. This means the attorney may incur liability for acts done in reliance on the power.

The traditional rule terminating powers of attorney on incapacity often worked against the best interests of the grantor, depriving him or her of the attorney's assistance in financial matters just when it was most needed. No doubt, before legal recognition was given to enduring powers, many attorneys carried on in spite of, or in ignorance of, the law. As the English Law Commission observed, "the common practice" was at "variance with the requirements of law":

> It is clear that in a great many cases, attorneys continue to act notwithstanding that their donors have become incapable and that indeed in doing so, they perform a valuable service since if the jurisdiction of the court of protection were invoked in all

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[5] *Halsbury's Laws of England* (4th), Vol. I, para. 238. See *Drew v. Nunn (*1879), 4 Q.B.D. 661 and *Young v. Toynbee* [1910] 1 K.B. 215. There is surprisingly little Canadian authority. However, *Drew v Nunn* was applied by the New Brunswick Supreme Court Appeal Division in *Re Parks* (1957), 8 D.L.R. 155.

> these cases, the court's present resources would not enable it to cope with the resulting increase in work.[6]

The problem was most acute in cases in which the power of attorney was designed for the purpose of assisting an individual whose mental capacity was beginning to decline. Even before the enduring power of attorney was given legal status, the utility of powers of attorney as a way to make private arrangements for managing the finances of individuals who felt that their age or health made it difficult for them to carry on their affairs was recognized. Such arrangements were likely common, but prudent legal advice would have had to recommend against them. As the British Columbia Law Reform Commission observed in 1975:

> There are probably few solicitors in practice who have not, at one time or another, been approached by an elderly client requesting that a power of attorney be prepared appointing a close friend or relative to conduct his affairs because the client fears or feels his mental powers may be weakening. It is not easy to explain that a power of attorney will not serve his needs and that at the very moment he would wish such a power to become operative, it would, in law, be terminated.

It was for reasons such as these that the enduring power of attorney was created by statute.

3. Enduring powers of attorney legislation

Enduring powers of attorney appear to have first been considered in the English Law Commission's general review of the law of powers of attorney in 1970. Although the English Commission found that few grantors or attorneys were aware of the termination rule, it ultimately decided against any change in the law. However, the idea was quickly taken up by other law reform agencies in Canada and Australia. Law Reform Commissions in Manitoba, Ontario, and British Columbia all recommended enduring powers of attorney legislation in the 1970's.[7]

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[6]English Law Commission, *Powers of Attorney* Law Com. No. 30, Cmnd. 4473 (1970). The effect of the rule was confused by judicial pronouncements on the degree of incapacity required to terminate a power of attorney. In *Drew v Nunn (*1879), 4 Q.B.D. 661, it was suggested that "I doubt whether partial mental derangement would have that effect [termination of a power of attorney]." The New South Wales Law Reform Commission asked: "is [the attorney] to adjudicate upon the donor's mental capacity and say the donor has passed from ability to act for himself into inability? If so, on what principles does he adjudicate? . . . as the law stands now, the answers to these questions are open".

[7]Ontario Law Reform Commission, *Report on Powers of Attorney*, 1972; British Columbia Law Reform Commission, *Powers of Attorney and Mental Incapacity* (Working Paper No. 12), 1975; Manitoba Law Reform Commission, *Report on Special, Enduring Powers of Attorney*, 1974; The New South Wales Law Reform Commission (*Working Paper on Powers of Attorney*, 1973); Queensland Law Reform Commission, *Assisted and Substituted Decisions:*

Canadian and Australian law reformers were most interested in the enduring power as a mechanism for making plans against possible incapacity, an alternative to court appointment of a guardian. The Ontario Commission observed that:

> It is distasteful for many people to have a parent, grandparent, aunt or uncle or even close friend declared mentally incompetent, to say nothing of the expense and delay involved in such a procedure.

The British Columbia Commission noted that:

> The proponents of the enduring power of attorney point out that it has advantages that transcend the narrower objective of protecting the attorney. First, it provides an attractive alternative to the appointment of a committee [guardian] under relevant legislation such as British Columbia's *Patients' Estates Act*, as it obviates the sometimes unhappy necessity to apply to court for a declaration that the principal is no longer capable of managing his affairs . . . It is doubly distasteful in situations where the patient's mental state is insufficient to allow him to manage his own affairs but he has sufficient awareness to cause him to be acutely humiliated if the application is necessary.
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> There is also something to be said for giving the principal some control, through appointing a person of his choice as attorney, over the management of his affairs should he become incapacitated.

These observations perhaps carry even more weight now than in the 1970's, as legislators and reformers search for less intrusive alternatives to full guardianship that respect both the dignity and the differing needs of vulnerable adults.

Canadian law reform agencies also considered legal mechanisms to protect against abuse of enduring powers of attorney. They recognized that a vulnerable person who is already incapacitated, or who fears that his or her capacity is beginning to fail, might be persuaded to give control of property to an unscrupulous relative or acquaintance who would use it for his or her own purposes. Because a grantor is not able (practically or legally) to dismiss an attorney after becoming incompetent, one of the principal controls on attorneys is lost when enduring powers are permitted. The essentially private nature of the power of attorney makes public scrutiny of attorneys difficult. However, the legislation adopted in the wake of Commission reports did not incorporate many of the proposed safeguards. Although the motives of legislators can now only be guessed, it is likely that they preferred to begin with a simple formula. It was perhaps thought that some practical experience with enduring powers was required before necessary safeguards against abuse could be formulated.

Decision-making for people with decision-making Disability, 1995.

The Saskatchewan *Powers of Attorney Act*[8] is typical of first-generation enduring powers legislation. Although the impetus to adopt the legislation was the perceived value of enduring powers of attorney for grantors, part of the thrust of the legislation is aimed at protecting attorneys. Section 2 of the Act provides protection for attorneys under ordinary powers of attorney who have innocently continued to act after the grantor has lost capacity. Section 3 of the Act creates the enduring power of attorney, and does so without much elaboration:

> 3 The authority of an attorney given by a written power of attorney is not terminated by reason only of subsequent mental infirmity of the donor that would but for this Act terminate the authority if the power of attorney:
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> (a) provides that the authority is to continue notwithstanding any mental infirmity; and
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> (b) is signed by the donor and a witness, other than the attorney or the spouse of the attorney, to the signature of the donor;

The only safeguard included in this section is the requirement of a witness independent of the attorney. The last section of the Act provides what can be regarded as an additional safeguard. Although presumably an incapacitated grantor cannot revoke the power, it can be terminated by appointment of a property guardian (formerly known as a committee) who takes over responsibility for managing the grantor's affairs:

> 4 Subject to section 2, the authority of an attorney under a power of attorney mentioned in section 3 terminates on the appointment of a committee.

Because powers of attorney are private matters between grantor and attorney that are not required to be registered or otherwise reported to any public authority, there are no statistics on their use. However, some information about the use of enduring powers has been gathered by the Commission from discussions with members of the legal profession, officials of the Public Trustee's office, and non-governmental organizations that work with vulnerable adults. It would appear that the new legislation was only occasionally used in the first few years after its adoption. It perhaps took time for the public and legal advisors to become aware of the option. More recently, there has been a sharp increase in the popularity of enduring powers. Lawyers report that they are now routine, a common part of estate planning for elderly clients. Advisors of vulnerable adults other than lawyers also report increased use of enduring powers, and often recommend them. They are regarded as a simple, inexpensive alternative to court-appointed guardianship. Many people the Commission questioned about enduring powers noted that preprinted forms are now available at office supply stores, making it possible for an enduring power to be prepared without consulting a lawyer.

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[8] *The Powers of Attorney Act*, S.S. 1982-83, c. P-20.1, re-enacted S.S. 1996, c. P-20.3

4. The obligations of attorneys

The Saskatchewan *Powers of Attorney Act* makes no mention of the responsibilities of attorneys. This does not, of course, mean that the law does not impose obligations on them. In law, "a person who undertakes to act in the interests of another person" is a fiduciary, and owes a fiduciary duty to the grantor. In general terms, the nature of a fiduciary duty is clear:

> A fiduciary relationship is one in which there is a duty on the fiduciary to act solely for the benefit of another or others with respect to any property that is the subject matter of the relationship. This duty has often been described as the duty of loyalty.[9]

Breach of a fiduciary duty is actionable in court. Fiduciaries are liable for any losses resulting from breach of their fiduciary duty.

There is surprisingly little authority directly applying the law of fiduciary relationships to powers of attorney. The most common fiduciary relationship is the trust, and the duties of fiduciaries have been most thoroughly examined in the trust context. The power of attorney is trust-like, and attracts a high standard of responsibility. A fiduciary who falls within this category must keep the property separate from his own, and he is debarred from trading with it for his own benefit. In addition, the grantor (or someone claiming through the grantor) has the right to demand an accounting from the attorney. Finally, the courts will trace property belonging to the grantor that has been wrongfully disposed of by the attorney, and return it to the grantor unless the person who received the property had no knowledge of the breach of fiduciary duty.[10]

An action for breach of fiduciary duty is ordinarily brought by the person for whom the fiduciary acts. Thus legal action can be initiated by the grantor of a power of attorney. But it does not appear that anyone other than the grantor ordinarily has standing to question the actions of an attorney in court. This creates an obvious problem, because an incompetent grantor lacks capacity to bring a legal action. Appointment of a litigation guardian to bring an action on behalf of the grantor is possible, but it may be more practical to apply to court for appointment of a property guardian under *The Dependent Adults Act* (soon to be replaced by *The Adult Guardianship and Co-decision-making Act*). The property guardian will supersede the attorney under the power of attorney, and will have standing to demand an accounting for management of the grantor's affairs while the power was in force. Similarly, after the grantor's death, the executor of the grantor's estate can call for an accounting from the attorney.

These mechanisms for holding an attorney responsible for his or her actions are not entirely adequate. A competent grantor can deal quickly with suspected misuse of an ordinary power by terminating it. Once the grantor's property is back in the grantor's control, the extent of the attorney's breach of fiduciary duty can be assessed. The grantor can then decide whether further action against the attorney

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[9]Sealy, "Fiduciary Relationships" [1962] *C.L.J.* 69.

[10]Sealy, "Fiduciary Relationships" [1962] *C.L.J.* 69.

is merited. A friend or relative of an incompetent grantor is, under the present law, forced to take legal action to prevent further abuse of a power of attorney, and often must act before full evidence of the breach of fiduciary duty is available.

II. THE NEED FOR REFORM

1. The approach to reform

In the seventeen years that enduring powers of attorney have been authorized by the law in Saskatchewan, experience with their use has accumulated. The time has come to review *The Powers of Attorney Act* to incorporate this experience into law.

Reform of the enduring power of attorney should focus on three related sets of issues:

(A) Abuse of powers of attorney

As the report of the *Steering Committee on Abuse of Adults in Vulnerable Circumstances* observed,

> There are no procedures as to how a power of attorney is signed and no legislation as to how the attorney must conduct himself or herself once appointed.
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> We know that, while most holders of powers of attorney act ethically, some attorneys abuse their powers. We recommend review of the law in this area to determine whether amendment of *The Powers of Attorney Act* would be appropriate. Any amendments should strike a balance between the individual right to self-determination and protection of the individual. The review should look at whether there is a need for legislative requirements for accounting and monitoring, and should explore other ideas respecting responses to clear violations of trust in exercising authority under powers of attorney.

Case histories and other information gathered while preparing this paper show that abuse of powers of attorney is a very real problem. The concern about potential abuse expressed by law reform agencies in the 1970's has been justified. Because abuse of enduring powers is the most persuasive and important reason for recommending immediate reform, the abuse problem will be discussed in more detail in the next section of this report.

(B) Integration of enduring powers legislation and guardianship legislation

The enduring power of attorney is only one way in which an incompetent adult's affairs can be placed under the management of another who acts on the incompetent's behalf in a fiduciary capacity. The

principal alternative is appointment of a guardian by court order under *The Dependent Adults Act*.[11] Although full guardianship of a vulnerable adult is sometimes unavoidable, less intrusive alternatives should be preferred whenever possible. Part of the reason for the popularity of enduring powers of attorney is the reluctance many people have to apply to the courts for formal appointment of a guardian. The Queensland Law Reform Commission observed that:

> The enduring power of attorney allows an individual to plan for the future and choose the person whom he or she would want to make decisions on his or her behalf if he or she became unable to decide personally. It is a private arrangement, which can be revoked . . . while the donor has capacity. It thus enhances individual autonomy and provides a far less intrusive solution than appointment of a decision-maker by the tribunal.
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> . . . For people with impaired capacity, and their relatives and carers, [court] hearings almost inevitably involve some inconvenience and anxiety, and, no matter how sensitively they are handled, there may also be some degree of embarrassment or distress. The simple expedient of granting an enduring power of attorney while it is possible avoids these difficulties.

Recent reviews of guardianship legislation in Canada have identified the need to create a broader range of alternatives that can be tailored to the specific needs of individuals who are no longer able to manage their own affairs. Gordon and Verdun-Jones include in the "fundamental principles" of new guardianship legislation the notion that guardianship is a "last resort" when seeking "the least restrictive, intrusive, stigmatizing and depowering mode of intervention". They also stress the importance of respecting the vulnerable adult's wishes whenever possible.[12] The *Steering Committee on the Abuse of Adults in Vulnerable Circumstances* concluded that "for some adults, the appointment of a personal guardian under *The Dependent Adults Act* is more than they need". The Committee recognized that options are needed:

> The Steering Committee believes that a strategy aimed at addressing the varying needs of adults in vulnerable circumstances should focus on providing a continuum of support. A range of services, from less to more intrusive, should be available to meet the needs of these adults.

The Legislation Working Committee adopted this approach in its review of *The Dependant Adults Act*. For example, the new legislation will provide for "supported decision-making", allowing vulnerable

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[11]S.S. 1985, c. D-10.5. It is anticipated that this act will be replaced by *The Adult Guardianship and Co-decision-making Act* as of July 15, 2001.

[12]John Mcleod, "Fundamental Principles and Elements for New Legislation", paraphrased and adapted from Gordon and Verdun-Jones for the Saskatchewan *Legislation Working Committee re: Adult Guardianship and the Financial Abuse of Vulnerable Adults.*

individuals to retain some control over decisions affecting them, as an alternative to full guardianship in appropriate cases.

The enduring power of attorney provides another option to full guardianship. In both Ontario and British Columbia, review of guardianship legislation and enduring powers has been seen as part of a single effort to create a continuum of options. The British Columbia *Representation Agreements Act, 1993*[13] retains the enduring power. The legislation is designed to coordinate with provisions in new guardianship legislation adopted at the same time. The Ontario *Substitute Decisions Act, 1992*[14] encompasses both enduring powers and guardianship in a single enactment, making both part of a larger range of options. Alberta has also recently amended powers of attorney legislation. While the amendments were not made part of a package that included extensive amendment to guardianship legislation, many of the features of the British Columbia and Ontario reform of enduring powers were incorporated in the Alberta legislation.[15]

Integration of enduring powers of attorney legislation and guardianship legislation implies two significant changes in enduring powers legislation. First, the mechanisms adopted to provide scrutiny of guardians and quasi-guardians should be adapted, in so far as possible, to attorneys of enduring powers of attorney. Second, powers of attorney legislation should be reexamined to better define the place of the enduring power in the continuum of options.

(C) Other improvements

Experience since enduring powers legislation was adopted points to a number of minor changes in the law that would enhance the utility of enduring powers. These include such things as making standard forms available and allowing for appointment of more than one attorney or of an institutional attorney (such as a seniors advocacy group).

2. The problem of abuse of enduring powers

Enduring powers of attorney are a useful addition to the options currently available to deal with the problems of vulnerable adults. However, there is accumulating evidence of abuse of enduring powers. The very thing that makes enduring powers attractive – their relative informality and lack of court involvement – also increases the potential for abuse. As enduring powers become more popular and the population of Saskatchewan ages, we can expect an increase in abuse of enduring powers of

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[13]R.S.B.C. 1996, c. 405.

[14]S.O. 1992, c. 30.

[15]*Powers of Attorney Act,* S.A. (Consolidated), c. P-13.5, as amended by 1996, c. P-4.03.

attorney. It is therefore mandatory to build safeguards into the system to discourage, prevent, and detect abuse.

The potential for abuse is not hard to identify. An enduring power is most often adopted when family or friends begin to have doubts that an individual will retain capacity to manage his or her own affairs. While an enduring power is not valid if it is signed after the grantor has become legally incompetent, no examination of competence is required to grant a power of attorney, and even if the grantor is legally competent, he or she may have diminished capacity. In either event, the grantor may be vulnerable to undue influence. If the proposed attorney and others who urge the grantor to sign the document are genuinely concerned with the grantor's welfare, no problem need arise. But if the attorney is intent on gaining access to the grantor's estate for personal gain, abuse is difficult to prevent.

Unfortunately, the affairs of the grantor sometimes get caught up in family disputes. By gaining early access to the grantor's estate through a power of attorney, an unscrupulous heir can effectively exclude other family members from a potential inheritance. Even an attorney who is well-motivated when the power is signed may give way to temptation. A recent Saskatchewan case brought to the Commission's attention demonstrates the potential for abuse when there are disputes and misunderstandings in the family.

In 1982, an elderly woman made a will leaving her estate to her adult stepchildren, who she had raised, and with whom she maintained a close relationship. In 1990, she became ill, and began to show some symptoms of senility. Her stepchildren no longer lived in the province, but were concerned about her affairs. After discussions with her brother, it was agreed that he and his family would move into the elderly woman's home to provide her with companionship and assistance. As part of the arrangement, she granted an enduring power of attorney to her brother.

The brother abused his position, misdirecting her property and savings for his own benefit. Although the stepchildren had some concerns about the brother's management of her affairs, the full extent of his abuse of his position did not come to light until after his sister's death. Instead of moving in with his sister, he moved her to his home. Her house was then provided to his children rent-free. Her funds were used to pay his business debts. As much as $1500 a month was withdrawn from her credit union account for unspecified purposes. A cabin owned by the grantor was sold to pay the attorney's back taxes. Eventually, the grantor's brother took her to a lawyer to change her will, making him sole beneficiary. He did not reveal to the lawyer that only two days earlier, a doctor had signed a medical certificate declaring his sister mentally incompetent (so that she could collect a disability benefit). In order to avoid embarrassing questions, he did not arrange for the new will with the lawyer who had drawn the power of attorney and the old will.

The stepchildren's efforts to determine the state of their mother's affairs was undermined by the absence of any easy mechanism for compelling either the grantor or the financial institution that held the woman's funds to disclose information. The financial institution refused to release information, citing confidentiality. In the absence of concrete evidence of financial abuse, the stepchildren's options were few. They might have taken allegations of fraud to the police, but likely did not have

enough evidence to justify a criminal investigation. They might have sought court appointment as guardians of their stepmother, but were not prepared to take such a drastic step on the basis of suspicions rather than hard evidence.

After the woman's death, the new will was challenged, and an accounting of management of her affairs under the power of attorney was requested by the stepchildren. The case was settled after a pre-trial conference. The old will is now in probate.

Vulnerable adults, especially the elderly, are sometimes victimized by people who claim to be friends. At least occasionally, the pattern of fraud involves persuading the vulnerable individual to grant a power of attorney. In a case brought to the Commission's attention, adult children living in Saskatchewan discovered that their mother, who lives in British Columbia, had granted a power of attorney to neighbours, who were in the process of negotiating sale of her home. They were able to prevent abuse by notifying the bank that held their mother's funds and the lawyers involved in the real estate transaction that they suspected fraud. They were fortunate that the financial institution and lawyers cooperated in this case.

Because powers of attorney are essentially private arrangements, and because potential victims are often unable to effectively assert their rights, it is difficult to gauge the extent of abuse. It is likely that most attorneys conscientiously carry out their duties. But the number of cases of abuse is almost certainly significant. Lawyers, service providers for the disabled and seniors, officials of the Public Trustee's office, and other professionals interviewed during preparation of this paper were almost unanimous that reform is necessary.

Although no reliable statistics on the extent of the problem are available, the experience of the Public Trustee's office with enduring powers may give some idea of the scope of abuse. Officials estimate that 5 or 6 complaints are received each month alleging problems with enduring powers of attorney. There are also complaints about similar relationships (trusteeship under Old Age Security legislation and joint bank accounts involving the elderly or incompetent). Misuse of funds is described as a "quite common" basis of complaint, but there are also concerns that bills are not being paid by the attorney/trustee. The latter is often a reason for suspecting misappropriation of funds.

Because the Public Trustee's powers of investigation are limited under the present law, the proportion of complaints that are valid cannot be accurately determined. The Public Trustee usually can do no more than give advice, and there is usually no follow up. However, officials in the Public Trustee's office believe that only the "tip of the iceberg" comes to attention.

III. APPROACHES TO REFORM

1. Formalities: Witnesses and execution

Under the Saskatchewan *Powers of Attorney Act*, an enduring power of attorney must be in writing, and signed by the grantor and a witness "other than the attorney or spouse of the attorney". Formalities can provide some protection against abuse and fraud. A written power clarifies the scope of the attorney's authority. The grantor's signature provides evidence that the document is genuine. The signature requirement also fulfils what has been called a "cautionary function" by focussing the grantor's attention on the legally binding effect of the document. The witness provides additional evidence that the document is genuine, but also performs what has been called a "protective function" by making it more difficult for an unscrupulous person to coerce a vulnerable individual to sign the power of attorney.

These are appropriate, but minimal, formal requirements. Law reform agencies that have examined enduring powers of attorney have invariably considered additional formalities to discourage fraud and undue influence. However, it must be remembered, as the British Columbia Law Reform Commission observed, that "simplicity should be the key to any scheme which provides for enduring powers of attorney". Part of the attraction of enduring powers is their relative informality, which makes them accessible to the public and inexpensive to put in place. Thus formalities should not be multiplied unless they can be demonstrated to significantly reduce opportunities for fraud and abuse.

(A) Witnesses

The role of the witness, as a strict matter of law, is limited to authenticating the signature on a document. The witness must be present when the document is signed. But witnesses have other practical functions. Witnesses to the grant of powers of attorney have at least two practical protective functions: (1) They discourage a fraudulent would-be attorney by forcing him to justify his actions to the witnesses. (2) They can protect the grantor from manipulation because they must be satisfied that the grantor is acting freely and competently.

To fulfil a protective function, witnesses must be unbiased and knowledgeable. It is obviously important that witnesses be independent of the attorney and able to assess the grantor's ability to understand what the power of attorney involves. As the Queensland Law Reform Commission observed:

> The requirement of an independent witness is an essential safeguard for the donor. Elderly people, for example, may be susceptible to pressure to grant an enduring power of attorney to a particular person or in a particular way. The presence of an independent witness who must certify the donor's capacity serves to lessen the risk of exploitation of this kind.

The Saskatchewan *Powers of Attorney Act* recognizes the importance of independence by barring the attorney and the attorney's spouse from acting as witnesses. More recent powers of attorney legislation usually requires two witnesses, and broadens the exclusions. The Ontario *Substitute Decisions Act* provides that:

> **10** (1) A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witnesses.
>
> (2) The following persons shall not be witnesses:
>
> 1. The attorney or the attorney's spouse or partner.
>
> 2. The grantor's spouse or partner.
>
> 3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
>
> 4. A person whose property is under guardianship or who has a guardian of the person.
>
> 5. A person who is less than eighteen years old.

The Manitoba Law Reform Commission also recommended that witnesses be required to complete an affidavit confirming that they are eligible to act as witnesses. The Queensland Commission similarly recommended that witnesses should sign a "witness certificate" confirming eligibility, and in addition, stating that the grantor appeared to understand the effect of the power of attorney when it was signed. The Queensland "witness certificate" is an appealing idea. It would direct witnesses' minds to the matters they ought to consider in carrying out their role.

Because of the danger that an unscrupulous person will take advantage of an incompetent individual by persuading him or her to sign a power of attorney, some law reform agencies have argued that special safeguards to ensure that the grantor of a power is competent are required. For example, the Manitoba Law Reform Commission proposed that one of the witnesses be a physician or a lawyer.

Requiring that enduring powers be witnessed or otherwise confirmed by a lawyer or physician is only useful if it is assumed that professionals are better able to assess competency, and that formal assessment is important to prevent fraud. While an appropriate level of competence should remain a requirement, in our opinion, the practical danger is not so much that an enduring power will occasionally be executed by a person who is technically incompetent as that incompetents may be more easily persuaded to sign a power against their own interests. Thus, a professional assessment of competence is not of much value in itself.

A better approach might be to require legal advice for both the grantor and the attorney before the power of attorney is signed. The grantor's lawyer would of course be concerned with capacity, but

perhaps more importantly, would ensure that the grantor understood the effect of the power of attorney, and freely consented to it. Legal advice would also help ensure that attorneys understand that they are under a fiduciary duty, and do not have authority to use the grantor's property for their own purposes. Practising lawyers consulted during preparation of this paper favoured independent legal advice as a safeguard against abuse.

Recommendations For Discussion

1. The grant of an enduring power of attorney should be witnessed by two witnesses.

2. The witnesses should not be the spouse or an immediate family member of either the grantor or the attorney.

3. Witnesses should complete and sign a Witness Certificate acknowledging that they are eligible to act as witnesses, and affirming that the grantor appeared to understand the effect of the power of attorney. Failure to complete the witness certificate should not, however, affect the validity of the enduring power of attorney.

4. Both grantor and attorney should have independent legal advice before the power of attorney is signed.

(B) Standard Forms

The *Steering Committee on the Abuse of Adults in Vulnerable Circumstances* has suggested that a standard form of enduring power of attorney should be considered. The Committee observed that at present:

> There are many forms used for powers of attorney. Every financial institution has a different form, each law firm prepares a different form and stationary stores print different forms. Some are long, and some are short.

Both members of the legal profession consulted by the commission and representatives of advocacy groups for vulnerable adults suggested to us that a simplified form that clearly set out the authority granted by the power of attorney would be useful. It was also pointed out to us that financial institutions are often reluctant to recognize powers of attorney other than those in the form they supply.

Some jurisdictions include standard forms in enduring powers of attorney legislation. There are some obvious advantages in such an approach. A standard form would ensure that the authority the power purports to grant conforms to law and is set out clearly. Perhaps of equal importance, a statutory form could be annotated with instructions, appropriate warnings, and explanations that would help ensure that both the grantor and attorney fully understand the effect of the document. The Queensland Law

Reform Commission has recommended a form that includes, in addition to the Witness Certificate discussed above, notices to the grantor, attorney and witnesses that explain the enduring power in plain English.

The Queensland Law Reform Commission also recommended that the statutory standard form should be mandatory. If a statutory form is useful, it can be argued that it should be mandatory. The protections the form provides are obviously of no practical use if the form is not used. There are, however, some strong arguments against a mandatory form. It is difficult to force all enduring powers of attorney into a single mould. While a standard form may be satisfactory in a majority of cases, the complexity of some estates may require adoption of special provisions. Moreover, many of the forms used by the legal profession are satisfactory, and reflect the experience of those who have made and used them. A mandatory form could become yet another complication that makes execution of a power of attorney more difficult. It is interesting to note that the Queensland Law Reform Commission found it necessary to draft a new statutory form because the mandatory form already in force in Queensland had proved to be too inflexible.

It should also be noted that the new approach to substituted decision-making now being advocated places a premium on flexibility. If the goal is to interfere with the autonomy of the vulnerable adult only as much as is required for his or her protection, room should be left for powers of attorney that do not encompass all of the donor's affairs. While it may be possible to build some flexibility into a standard form, the cost of this flexibility is a more complicated, more difficult to use form.

It may be that the best argument for the Queensland mandatory form is not the mandatory form itself, but the annotations that accompany it. It would be useful to include such features as notices to grantors, attorneys and witnesses as annexes to powers of attorney. However, it may be possible to achieve this goal without adopting a mandatory form. Two mechanisms can be suggested.

First, the standard form could be made available at nominal cost through government agencies. The form could be packaged with instructions and appropriate information for prospective grantors, attorneys and witnesses. If it is readily available and easy to use, the standard would likely supplant other forms. The Saskatchewan Department of Justice has adopted a similar approach in other cases. For example, forms and instructions for application for appointment of a guardian under *The Dependent Adults Act* are available from the Department. Second, features such as the Witness Statement can be required by statute without adopting a mandatory form for the enduring power itself.

Recommendations for Discussion

5. A standard form of enduring power of attorney written in plain English should be provided by statute or regulation, but use of the standard form should not be mandatory.

6. The standard form should be made available through government agencies at nominal cost, together with instructions and appropriate information about enduring powers of attorney.

(C) The grantor's signature

An enduring power of attorney should be in writing, and ordinarily signed by the grantor. Because some individuals who desire to grant an enduring power of attorney may be physically incapable of signing the document, provision should be made for an alternate form of execution. The Alberta *Powers of Attorney Act* provides that a power of attorney must be signed by the grantor in the presence of a witness, or:

> . . . if the donor is physically unable to sign an enduring power of attorney, by another person on behalf of the donor, at the donor's direction and in the presence of both the donor and a witness.[16]

In order to discourage fraud or undue influence, the person who signs on behalf of the grantor should be unbiased. Alberta excludes the grantor's and the attorney's spouse. The restriction should be at least as stringent as the restriction on who can act as a witness.

Recommendations for Discussion

7. An enduring power of attorney should be in writing, and ordinarily signed by the grantor.

8. If the grantor is physically unable to sign the enduring power of attorney, a person who is not a member of the grantor or attorney's family should be authorized to sign the power on behalf of the grantor. A person signing on behalf of a grantor should do so in the presence of both the grantor and the witnesses.

2. The grantor

(A) The capacity test

A power of attorney is valid only if the grantor had legal capacity when it was made. This is a necessary prerequisite. The enduring power of attorney is premised on the idea that a person who is still able to make decisions for himself or herself should be able choose a decision-maker who will manage the grantor's affairs in the event of incapacity. Individuals who have been deprived of the ability to make informed, rational decisions can no more choose agents to act for them than they can make other decisions about management of their affairs. The enduring power of attorney is not a substitute for court appointment of a guardian in all cases. It is important that prospective grantors, witnesses, and advisors of vulnerable adults satisfy themselves that a prospective grantor has capacity to grant a power of attorney before this option is selected.

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[16]S.A. (Consolidated), c. P-13.5, as amended by 1996, c. P-4.03.

The Saskatchewan *Powers of Attorney Act* makes no reference to the capacity of grantors, leaving it to the general law to provide guidance. Unfortunately, the capacity test applicable to powers of attorney is not clearly defined in law. It would be desirable to codify a capacity test in enduring powers of attorney legislation.

Three reasons for codification can be identified. First, codification would clarify the presently uncertain law. Second, codification would provide direction to non-lawyers who consult the legislation. Time and again, health care professionals and advisors to vulnerable adults complained to us about the cryptic way in which statutes used by the general public are drafted. Lawyers understand that legislation may leave much to general principles and the common law. The public expects statutes to provide more guidance. Finally, codification would make it possible to adopt an appropriate test of capacity that reflects the place of the enduring power of attorney in the continuum of options available to assist vulnerable individuals.

It does not follow, however, that codification will make resolution of the issue of capacity a fool-proof, mechanical exercise in decision making. Capacity is not something that can be precisely measured and reduced to a formula. The definition should be clear enough to give useful guidance to lay people who are considering whether an enduring power would be appropriate, and complete enough, in conjunction with general legal concepts of capacity, to provide direction to the courts if they are called upon to adjudicate on the issue of capacity. But it should be simple and flexible, and should not attempt to cover all aspects of the question of capacity in an exhaustive fashion.

The most difficult problem in formulating a capacity test is identification of the level of capacity that should apply to enduring powers of attorney. If, as some authorities suggest, the proper test is capacity to do all the things the grantor is authorized to do, the test must be characterized as stringent. Most enduring powers of attorney confer authority to deal with the grantor's real property. The capacity test applied in law to sale and purchase of real property is narrow, requiring capacity to understand both the nature and consequences of a particular transaction, and the ability to access whether the transaction is beneficial. Even a person in the early stages of senility is likely incompetent to sell or purchase real property.

Enduring powers of attorney are usually made when the grantor has reason to believe that he or she may become incompetent, and usually only after there are some symptoms of declining mental faculties. Very few grantors could pass strict application of the capacity test outlined above. A narrow capacity test deprives the enduring power of attorney of much of its utility. The Queensland Law Reform Commission suggested that:

> It is necessary to have a test stringent enough to protect donors who may be vulnerable to manipulation. However, if the test is too strict, enduring powers of attorney will be available to fewer people, and their value as a method of enabling people to provide for the time when they may be unable to make their own decisions significantly diminished.

The practical value of a capacity test is protection of a potential grantor whose inability to appreciate the consequences of granting the power may be exploited by others. The test should therefore focus, not on ability to manage affairs in detail, but on ability to understand the effect of the power of attorney itself. An individual who may no longer be able to rationally decide whether a farm should be sold, or assess the reasonableness of the price offered, may nevertheless realize that he or she needs assistance to make decisions such as this.

The Ontario *Substitute Decisions Act* provides that:

> **8.8.**(1) A person is capable of giving a continuing power of attorney if he or she:
>
> (a) knows what kind of property he or she has and its approximate value;
>
> (b) is aware of obligations owed to his or her dependants;
>
> (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to conditions and restrictions set out in the power of attorney;
>
> (d) knows that the attorney must account for his or her dealings with the person's property;
>
> (e) knows that he or she may, if capable, revoke the continuing power of attorney;
>
> (f) appreciates the possibility that the attorney could misuse the authority given to him or her.

This formula identifies most of the matters about which a grantor should ideally be aware. However, it can be argued that it includes more detail than required. The detail may hinder rather than help an advisor considering whether an enduring power of attorney is appropriate by deflecting attention to specifics, effectively hiding the forest among the trees. The question is whether the grantor has a sufficient understanding of the nature of an enduring power to appreciate that he is granting control of his affairs to another. This principle can be stated simply and clearly. The Alberta *Powers of Attorney Act* provides that:

> **3** An enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.

This formula is sufficient to distinguish the capacity to grant an enduring power from capacity to do other legally binding acts, such as sale or purchase of real estate. It focuses on the appropriate principle in a clear manner that will be easily understood by both the courts and the general public.

Recommendations for Discussion

9. Enduring powers of attorney legislation should incorporate a statutory test of capacity to grant an enduring power.

10. The capacity test should provide that a grantor may make an enduring power of attorney if he or she is capable of understanding the nature and effect of the enduring power of attorney.

(B) Suspended operation of enduring powers of attorney

Most powers of attorney come into effect when they are signed. This practice was established before enduring powers of attorney were recognized in law, and makes obvious sense when the purpose of the power is to appoint an agent for business purposes. Enduring powers of attorney, on the other hand, are designed for future use. The grantor confers authority on the attorney while he or she still has capacity to do so, but the attorney is expected to exercise the power only in the event that the grantor becomes incapacitated. There appears to be no reason in law why an enduring power cannot stipulate that it comes into effect only when the grantor becomes incompetent. Nevertheless, at present enduring powers are almost invariably worded in such a way that the attorney has authority to act in place of the grantor immediately on the signing of the power.

There are practical reasons why enduring powers are usually drafted to take effect immediately. If the power is to be effective in practice, it must clearly and unequivocally establish the attorney's authority. An attorney demonstrates authority to third parties by showing them the power of attorney. If the power states that it does not come into effect until some contingency occurs, third parties cannot be confident that the power is valid when it is presented. For that reason, grantors are forced under the present law to grant the power without any conditions on its face, and to rely on the attorney not to exercise the power unless and until it is required.

We have found no evidence that the existing practise is a source of problems. However, it is obviously not in conformity with the purposes for which enduring powers are made, and there is a potential for difficulties, even if they are not now evident. An attorney who decides to act before the grantor is incompetent may upset the grantor's own management of his or her affairs. If an attorney begins to act in the belief that the grantor has become incompetent and the grantor disagrees, the issue of competence may have to be determined by the courts. For these reasons, recent enduring powers of attorney legislation in Canada has made provision for enduring powers of attorney that come into effect only when the grantor becomes incompetent.

The Ontario *Substitute Decisions Act* provides that:

> 7 (7) The continuing power of attorney may provide that it comes into effect on a specified date or when a specified contingency happens.

9 (3) If the continuing power of attorney provides that it comes into effect when the grantor becomes incapable of managing property but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when,

(a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or

(b) the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act.*

"Assessors" under the Ontario legislation are professionals designated by regulation. Presumably, an attorney would be able to establish his or her authority by presenting the assessor's form with the power of attorney. This approach is probably workable, but some aspects of it are questionable. While use of designated assessors may ensure that decisions about incapacity are made in a consistent and professional manner, we see no compelling reason to depart from the established practice in Saskatchewan of relying on certificates of incompetence prepared by physicians. If a grantor wants more protection than this ensures, he or she can so stipulate in the power of attorney.

The Alberta *Powers of Attorney Act* may be a better model than the Ontario legislation. It provides:

5 (1) An enduring power of attorney may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor.

(2) An enduring power of attorney referred to in subsection (1) may name one or more persons on whose written declaration the specified contingency is conclusively deemed to have occurred for the purpose of bringing the enduring power of attorney into effect.

(3) A person referred to in subsection (2) may be the attorney appointed under the enduring power of attorney.

(4) Where the specified contingency referred to in subsection (1) relates to the mental incapacity or infirmity of the donor and

(a) the enduring power of attorney does not name a person for the purposes of bringing the enduring power of attorney into effect, or

(b) the person named for the purposes of bringing the power of attorney into effect

(i) dies before the enduring power of attorney comes into effect, or

(ii) is unable or is incapable of determining whether the specified contingency has occurred,

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the enduring power of attorney into effect, when two medical practitioners declare in writing that the specified contingency has occurred.

6 Notwithstanding any restriction, statutory or otherwise, relating to the disclosure of confidential health care information, where an enduring power of attorney is to come into effect on the occurrence of a specified contingency that is the mental incapacity or infirmity of the donor, information concerning the donor's mental and physical health may be disclosed to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

Several aspects of the Alberta provision deserve comment. While it is desirable to rely on a medical certificate if the power of attorney does not provide an alternative means of determining capacity, it is useful to expressly provide that the attorney may be named as the person who determines capacity. This will allow grantors to formalize the current practice if they so desire. Finally, section 6 of the Alberta Act is useful. Until the attorney is authorized to act on the grantor's behalf, access to medical records for use in determination of capacity may amount to breach of privacy in the absence of a provision similar to this.

Recommendations for Discussion

11. If an enduring power of attorney so provides, it should not come into effect until a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the grantor.

12. An enduring power of attorney referred to in recommendation 11 should specify the person or persons who will determine when a specified contingency has occurred, and may designate the attorney for this purpose.

13. When an enduring power of attorney comes into effect upon the incompetency of the grantor and no person is specified to determine competency under recommendation 12, a certificate of incompetency made by two physicians should be required to establish the grantor's incompetency.

3. The Attorney

(A) Restrictions on appointment

The attorney obviously must have legal capacity to carry out his or her duties. For that reason, a minor or an undischarged bankrupt should not be appointed attorney under a power relating to property and financial matters.[17]

A more difficult question is whether an individual who resides out of the province should be the attorney of a Saskatchewan resident. As a practical matter, an out-of-province attorney will have difficulty managing the day-to-day affairs of a person who lives in Saskatchewan. There may be situations, however, in which an out-of-province attorney makes practical sense. If, for example, the power relates only to property that does not require frequent attention, or if the property is out-of-province, a resident attorney may not be necessary.

Ideally, the attorney should be a disinterested steward of the affairs of the grantor. Thus, conflict of interest is a potential ground for barring an individual from acting as attorney. However, a rule barring all attorneys with a potential conflict of interest would create problems. Most attorneys under enduring powers of attorney are members of the grantor's family. Because a family member may be a beneficiary of the grantor's estate, the appearance of conflict-of-interest may be unavoidable in such cases. As the Queensland Law Reform Commission observed, when a family member acts as attorney, "almost every transaction which involves expending the donor's money will create a potential conflict of interest because it will result in a depletion of the donor's estate."

Some cases of abuse of powers amount to an effort by the attorney to gain premature and exclusive access to the grantors' estates. Nevertheless, the utility of the enduring power of attorney is, in large part, its availability as a way for families to make private arrangements for family members whose ability to manage their own affairs is declining. For that reason, it is probably not desirable to place any limitation on appointment of family members as attorneys.

Because an attorney is a fiduciary, he or she can be brought to account for any conflict-of-interest that actually occurs. The problem of conflict-of-interest is better dealt with in most cases by improving mechanisms for detecting and remedying abuse than by excluding potential attorneys. However, there may be two justifiable exceptions to this rule. First, as a matter of policy, individuals who have been convicted of fraud or fraud-related offences should be barred from acting as attorneys under enduring

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[17]The Saskatchewan *Powers of Attorney Act* and most other "first-generation" enduring powers legislation make no express reference to capacity to act as attorney. Some recent legislation expressly excludes minors from acting as attorneys (e.g. the Alberta *Powers of Attorney Act*, s. 2(2)), but does not expressly exclude undischarged bankrupts. However, the general law applicable to powers of attorney requires that the attorney have capacity to do the acts conferred by the power. This will generally exclude minors and undischarged bankrupts. Thus excluding them is a clarification, rather than a change in the law.

powers of attorney. While this would not prevent an unscrupulous individual with a criminal record from procuring appointment under a purported power of attorney, it would at least make it easier to stop abuse by obtaining a declaration that the power is void. Second, any person who provides personal care or health care to the grantor for remuneration should be barred from acting as attorney. The potential for conflict-of-interest is clear in this case. Because of public concern about possible abuse of incapacitated individuals in private nursing and special-care homes, even the appearance of a conflict-of-interest is unavoidable.[18]

Recommendations for Discussion

14. An attorney under an enduring power of attorney should be an adult, with full capacity to act on behalf the grantor, and should not be an undischarged bankrupt.

15. Except as provided in recommendations 16 and 17, no class of persons should be excluded from acting as an attorney under an enduring power of attorney merely because of a potential conflict of interest.

16. No person who has been convicted of fraud or a fraud-related offence should be eligible to act as an attorney under an enduring power of attorney unless that person has been pardoned.

17. A person who receives remuneration for personal care or health care of a grantor should not be eligible to act as an attorney under an enduring power of attorney.

(B) Multiple attorneys

The almost invariable practice in Saskatchewan at present is to appoint a single attorney under an enduring power of attorney. This is probably adequate in most cases, but there are circumstances in which more than one attorney would be useful. Recent revisions of enduring powers of attorney legislation in other jurisdictions have included provision for appointment of two or more attorneys.

There are some advantages in appointing more than one attorney. Each attorney may, for example, possess skills that would be valuable to the grantor. Appointment of two attorneys could, in some cases, avoid disputes in families. In addition, appointment of more than one attorney can be used as a mechanism to ensure continuity if one attorney dies or becomes unable to act.

Appointment of more than one attorney is almost certainly possible under the present law, but it would be useful to expressly provide for appointment of two or more attorneys. In addition, the legislation should make clear whether multiple attorneys act jointly or severally. If the attorneys are appointed jointly, they must act together. All decisions must be concurred in by all the attorneys. If the attorneys

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[18]Under the new guardianship legislation, health care and personal service providers are similarly barred from acting as guardians or co-decision-makers.

are appointed severally, each may act independently of the others. In most cases, joint appointment is probably desirable. There may nevertheless be circumstances in which it is more practical for the attorneys to act severally. For example, both attorneys may not be available to make day-to-day decisions, or one may be appointed for specific purposes. The formula contained in the Ontario *Substitute Decisions Act* presumes joint appointment, but allows several appointment as well:

> 7(4) If the continuing power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise.

Recommendations for Discussion

18. A grantor should be permitted to appoint two or more attorneys. The attorneys in such a case would act jointly unless the enduring power of attorney provides otherwise.

19. A grantor should be permitted to specify in an enduring power of attorney that appoints more than one attorney that each attorney has only those powers specifically granted to each.

(C) Corporate and institutional attorneys

An attorney under an enduring power of attorney is usually a family member, sometimes a friend or the family solicitor. Although there is at present no clear demand for revision of the law to allow appointment of a corporate or institutional attorney, such as an advocacy group or professional trustee, this option has attracted some attention in recent reviews of enduring powers of attorney legislation.

The Queensland Law Reform Commission observed that:

> There may be some people who wish to make their own arrangements for the eventuality of future loss of capacity to make their own decisions but who do not wish or are not able to appoint a relative or friend to act on their behalf. If these people are not able to appoint a corporate attorney, they may be denied the advantages of the legislation. Eligibility of corporate attorneys would increase the accessibility of enduring powers of attorney legislation.

However, the Queensland Commission also pointed to difficulties in allowing corporate attorneys:

> It would not be appropriate for all corporations to be eligible for appointment. Corporate service providers such as nursing home operators, for example, would inevitably be faced with a conflict of interest if they were appointed. There could also be problems with the standard of care of accountability for corporate attorneys.

The Queensland Commission concluded that corporate eligibility should be limited to the Public Trustee and trust companies. The Ontario *Substitute Decisions Act* is even more restrictive, limiting corporate appointments to the Public Trustee.

Queensland and Ontario may have taken too narrow a view of the potential utility of corporate attorneys. Trust companies have long acted as executors of wills, many of which contain trusts for dependants that require them to carry out many of the duties conferred on attorneys under enduring powers of attorney. The Public Trustee might reasonably be made available as an attorney if other options failed. However, both Ontario and Queensland ignore the potential use of advocacy groups and other not-for-profit organizations dedicated to assisting vulnerable adults. Representatives of these organizations are interested in the concept as a possible future development, though none are presently prepared to assume the role of attorney.

It may be desirable to facilitate use of corporate attorneys if interested organizations develop the capacity to provide this service. However, eligibility should not be open ended. In the absence of working models for provision of this service by corporate bodies, it would be wise to require approval from the Public Trustee or other designated official of a corporate appointment.

Recommendations for Discussion

20. Provision should be made for appointment of a corporate attorney under an enduring power of attorney.

21. No corporate attorney should be appointed under an enduring power of attorney unless the attorney has been approved by the Public Trustee.

(D) Resignation and succession

Under the present law, when an attorney dies or becomes incapacitated, the power of attorney lapses. An attorney may also resign, effectively terminating the power of attorney. Obviously, withdrawal of the attorney, whether voluntarily or not, can have unfortunate consequences for the grantor. In most cases, the only recourse available under the existing law will be for family and friends of the grantor to find a person willing to apply to the court for appointment as guardian, or, failing that, for the Public Trustee to become guardian.

Appointment of a guardian to supersede an attorney under a power may result in some inconvenience and expense, but if the appointment is made expeditiously, discontinuity in the management of the affairs of the grantor will not be a serious problem. For that reason, we do not believe that an effective enduring powers of attorney regime requires a mechanism for replacing attorneys when the power of attorney has not made provision for designating successors.

It should nevertheless be possible for a grantor to guard against discontinuity in the event that an attorney resigns, dies, or becomes unable to act. If two or more attorneys are appointed to act jointly, it would be reasonable to apply a survivorship rule. Unless the grantor has stipulated otherwise, the surviving attorney or attorneys should be authorized by statute to carry on. The Ontario *Substitute Decisions Act* adopts such a rule. The Ontario Act also provides that an enduring power of attorney may include a mechanism for replacing an attorney who becomes unable to act.

Difficulty may also occur if the attorney resigns. The Ontario legislation requires notice before resignation. The Alberta *Powers of Attorney Act* makes resignation more difficult. Under the Alberta Act, an attorney under an enduring power of attorney can renounce the power only with leave of the court. While this provides more protection for the grantor's interests, it may be too stringent. Potential attorneys should not be discouraged by knowledge that it may be difficult to withdraw if the duties under the power of attorney become too onerous. The principal concern in a case in which the grantor has not taken steps in anticipation of a discontinuity is to ensure that appointment of a guardian is not delayed. Requiring notice of resignation is sufficient for this purpose.

Recommendations for Discussion

22. When two or more attorneys are appointed to act jointly under an enduring power of attorney, and one of their number dies, resigns or becomes unable to act, the remaining attorney or attorneys should be authorized to continue to act.

23. An enduring power of attorney should be permitted to specify that in the event that an attorney under an enduring power of attorney resigns, dies or becomes unable to act, a person designated in the power shall, if he or she is willing and able to act, be substituted for the grantor.

24. No attorney under an enduring power of attorney should be permitted to resign without giving appropriate notice.

(E) Termination

An ordinary power of attorney terminates when revoked by the grantor. Because an ordinary power can be revoked at will, there is no need to specify other conditions that should terminate the power. For example, an ordinary power granted to a spouse can be revoked upon divorce if the grantor chooses to do so. An enduring power of attorney, on the other hand, cannot be revoked after the grantor becomes incompetent. A grantor's first line of protection from abuse under an ordinary power of attorney is the right to revoke the power. Some special termination provisions are necessary to provide protection for grantors of enduring powers.

The Saskatchewan *Powers of Attorney Act* provides that an enduring power of attorney terminates when a property guardian is appointed for the grantor. This is an essential provision. At present, it

is the most practical way to remove an attorney in cases of abuse. Under the recommendations discussed below to remedy abuse, appointment of a guardian will continue to be a necessary step after investigation of abuse. The Alberta, Ontario and British Columbia legislation contain similar provisions. If assisted decision markers are recognized in Saskatchewan law as an alternative to full guardianship, court appointment of such a quasi-guardian should similarly supersede an enduring power of attorney.

The Queensland Law Reform Commission recommends that an enduring power of attorney should terminate on divorce if the grantor and attorney were spouses at the time the power came into effect. In our opinion, this is useful provision.

Although the Saskatchewan legislation does not expressly so provide, enduring powers of attorney, like ordinary powers of attorney, are terminated on the death of the attorney or grantor, and on the incapacity of the attorney. Because these rules are part of the general law, it is not necessary to recite them in legislation. However, some powers of attorney legislation exhaustively specify circumstances that terminate enduring powers of attorney. For example, the Alberta Act provides:

> **13** . . . An enduring power of attorney terminates:
>
> (a) subject to section 11, if it is revoked in writing by the donor at a time when the donor is mentally capable of understanding the nature and effect of the revocation;
>
> (b) subject to section 12, if the attorney renounces the appointment and gives notice of the renunciation to the donor;
>
> (c) on the granting of a termination order pursuant to section 11;
>
> (d) on the granting of a trusteeship order in respect of the donor;
>
> (e) on the death of the donor or the attorney;
>
> (f) on the granting of a trusteeship order or the issuing of a certificate of incapacity in respect of the attorney.[19]

There may be some value in listing these things in legislation. Attorneys are not always aware of the circumstances that deprive them of authority. For example, a case was brought to the Commission's attention in which an attorney continued to manage the estate of a deceased grantor.

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[19]S.A. (Consolidated), c. P-13.5, as amended by 1996, c. P-4.03, s. 12.

Recommendations for Discussion

25. An enduring power of attorney should terminate upon appointment of a guardian or quasi-guardian of the property of the grantor.

26. Where the grantor and attorney of an enduring power of attorney are husband and wife when the power comes into effect, the power should be terminated by divorce.

27. Enduring powers of attorney legislation should list other circumstances in which an enduring power is terminated by operation of law, including the death of the grantor or attorney, and incapacity of the attorney.

(F) Responsibilities of attorneys

(i) The fiduciary duty

Attorneys are fiduciaries, who owe a duty to act in the interests of the grantor, using due care in their dealings with the grantor's property. While the scope of fiduciary duty in the context of powers of attorney has not been fully elaborated by the courts, the general thrust of the law is clear. However, because the Saskatchewan *Powers of Attorney Act* makes no reference to duties and responsibilities of attorneys, many attorneys and grantors under enduring powers of attorney are unaware of the basic legal principles involved.

It would be desirable to partially codify the standard of behaviour expected of attorneys under enduring powers of attorney. From a strictly legal point of view, codification would be useful to resolve any doubt about the nature of the fiduciary relationship created by a power of attorney. Perhaps more importantly, codification would provide direction to non-lawyers who consult the legislation. As noted above in the discussion of the capacity test applicable to powers of attorney, health care professionals and advisors to vulnerable adults complained to us about the cryptic way in which statutes used by the general public are drafted.

In recent years, law reform agencies and legal commentators have discussed the standard of care applicable to trustees.[20] Proposals for codification of the standard of care in this context can provide some guidance here. Two principles have emerged from these discussions.

First, the primary duty of trustees (and other fiduciaries) should be conceived as a duty to act honestly and with reasonable care. The notion of "reasonable care" implies an objective standard: the fiduciary's conduct is measured against what a reasonable person would have done in the same circumstances. Second, the standard should be flexible, requiring no more of the fiduciary than can be expected of a person with his or her experience and expertise.

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[20]E.g. Ontario Law Reform Commission, *Report on the Law of Trusts,* 1982.

The second proposition has not always been clear in the case law, with the result that too high a standard has sometimes been applied to nonprofessional trustees and other fiduciaries. Most attorneys are not professional financial advisors. They are family members who can be asked to do no more than the grantor would have done himself or herself. As the Queensland Law Reform Commission argued:

> The attorney will be someone well known to the donor. The donor is likely to be familiar with the attorney's strengths and weaknesses. The attorney . . . is the donor's choice as decision-maker should the need arise. Presumably, in making that choice, the donor has taken the attorney's limitations into account and is willing to accept them because the donor considers the attorney the most appropriate person to act on his or her behalf.

(ii) Conflict of interest

One of the most important implications of the duty owed by a fiduciary is avoidance of conflict-of-interest. Because abuse of powers of attorney almost always involves conflict-of-interest, it would be useful to set out the rule in clear language in the statute. The Queensland Law Reform Commission proposed that:

> An attorney should not be able to enter into a transaction in which the interests of the donor and the attorney, or a relation, a business associate or close friend of the attorney, could conflict.

However, as the Queensland Commission recognized, some qualifications of the rule may be necessary because the attorney is usually a member of the grantor's family. The attorney will almost always be a potential beneficiary of the grantor, and thus in technical conflict-of-interest whenever the grantor's property is dealt with. The Commission therefore recommended a provision to protect attorneys from allegations of conflict-of-interest based only on the attorney's status as a possible beneficiary:

> An attorney who, on the death of the donor, will or might be a beneficiary of the donor's estate does not, for that reason alone, have a conflict of interest with the donor.

Note carefully that this provision is not intended to allow an attorney to directly benefit himself or herself in a dealing with the grantor's property.

Ordinarily, the duty of the attorney is to the grantor. Any use of the grantor's property to benefit others is a breach of fiduciary duty unless it clearly appears that the grantor would have desired the attorney to act as he or she did, or that there is legal or moral obligation to confer the benefit. It may be useful

to recognize some of these circumstances in legislation. The Alberta Act states explicitly that an attorney's authority may be exercised:

> for the maintenance, education, benefit and advancement of the donor's spouse and dependent children, including the attorney if the attorney is the donor's spouse or dependent child (s. 7(b)).

(iii) Respecting the grantor's wishes

Another principal goal of enduring powers of attorney legislation is integration of enduring powers and guardianship. The attorney of an incompetent individual should continue to have full authority to make those decisions on behalf of the grantor that the document granting the power sets out. But that authority should be tempered wherever possible by consideration of the grantor's wishes.

Because recent legislative initiatives to reform both guardianship and powers of attorney legislation have been informed by the principle that the least restrictive alternative should be preferred, it is surprising that neither Ontario nor British Columbia have expressly applied the principle to powers of attorney. We believe it is possible to do so without undermining the authority of attorneys. The Queensland Law Reform Commission, however, did consider this issue. It suggested that attorneys should be required to:

> [consult] with the donor to the greatest extent possible to ascertain the donor's wishes, and [act] in the way that is least restrictive of the donor's rights and freedoms, [consistent] with the donor's proper care and protection.

Recommendations for Discussion

28. The standard of care required of an attorney under an enduring power of attorney should be included in legislation. The legislation should state that an attorney must act honestly in the interests of the grantor and with the care that can reasonably be expected of a person of the attorney's experience and expertise.

29. The legislation should state that, except as provided in recommendations 30 and 31, an attorney should not be able to enter into a transaction in which the interests of the grantor and the attorney, or a relation, a business associate or close friend of the attorney, could conflict.

30. An attorney who, on the death of the grantor, will or might be a beneficiary of the grantor's estate should not be deemed to have, for that reason alone, a conflict of interest with the grantor.

31. The legislation should expressly authorize an attorney to make provision for the maintenance, education, benefit and advancement of the attorney's spouse and dependent children, including the attorney if the attorney is the grantor's spouse.

32. The legislation should require the attorney to take into consideration the grantor's wishes and to carry out his or her duties in the least restrictive manner when it is possible to do so while ensuring proper management of the grantor's affairs.

4. Dealing with abuse

(A) Introduction

Powers of attorney are more difficult to police than guardianship under court order. This is perhaps an inevitable cost of the private nature of the enduring power of attorney. For the reasons discussed in the first chapter of this paper, the private character of enduring powers is also one of the reasons why they are an attractive alternative to guardianship in appropriate cases. Abuse of the authority of attorneys is a serious problem, but it should not be remedied in ways that make powers of attorney more complicated and costly.

The problem of abuse is best dealt with through two complementary strategies. First, remedies for abuse should be clearly defined and readily accessible. Second, interested parties should be able to obtain assistance in detecting and investigating abuse. Neither component is in place at present. The Saskatchewan *Powers of Attorney Act* provides no direction or assistance, and the general law of fiduciary relationships that applies to powers of attorney is not well adapted to dealing with abuse of enduring powers.

Although a grantor, or a litigation guardian acting on his or her behalf, can bring an action for breach of fiduciary duty, this alternative is expensive and time consuming. Litigation may be complicated by questions of standing: under the present law, only the grantor ordinarily has a clear right to apply to court. In addition, until a court application has been made, no one has a clear right to disclosure of relevant information in possession of the attorney or third parties such as financial institutions. Thus it is difficult to investigate the behaviour of attorneys. A friend or relative of a grantor may suspect that abuse is occurring, and find it difficult to gather enough evidence to justify a costly court application.

A concerned friend or family member may also respond to suspected abuse by making application to the court to be appointed guardian of the grantor. This may be the most practical course in most cases at present, but it is not always satisfactory. Guardianship applications are relatively simple proceedings, but if appointment of a guardian is objected to by the attorney, even a guardianship application can become complicated and expensive. Once again, concerned friends and relatives of the grantor may not be able to gather enough evidence of abuse to justify the expense of a court application.

Complaints and requests for assistance in investigating or stopping abuse are often taken to the Public Trustee. The Public Trustee has authority to investigate complaints of abuse by guardians, but only very limited authority to deal with complaints about enduring powers of attorney.

Both the courts and the Public Trustee should have larger and more clearly defined roles in preventing ands remedying abuse. The Public Trustee should be the first line of defence against abuse. The Public Trustee should have authority to compel disclosure of information and actively investigate allegations of abuse. When there is sufficient reason to suspect abuse, the Public Trustee should have authority to take immediate steps to prevent further abuse. The courts cannot perform these functions, but they should continue to be the forum in which rights are ultimately adjudicated, and permanent decisions made. Removal of an attorney, awards of damages, and other remedies for breach of fiduciary duty properly belong in the courts.

(B) The courts

The remedies available in court should be more clearly defined than at present. If remedies are clearly set out in legislation, both grantors and attorneys will be better able to determine their rights and obligations. Equally importantly, the problem of standing can be resolved by codification, ensuring that concerned friends and relatives of a grantor have access to the courts.

Four appropriate types of court proceedings in regard to enduring powers can be identified: (1) An action for breach of fiduciary duty; (2) An application to demand an accounting from an attorney; (3) An application by an attorney for direction; and (4) An application for termination of the power of attorney, or, if the power makes provision for a successor, removal of attorney.

It is likely that the first three types of application can be made at present. Although actions for breach of fiduciary duty under powers of attorney are rare, the underlying concepts are straight-forward. Partial codification of the standard of care required of attorneys has been suggested above. No other change in the law relating to breach of fiduciary duty is likely necessary.

It would be useful to codify the right to demand an accounting. Applications for this purpose directed to executors and trustees are routine. The right to demand an accounting from an attorney under a power of attorney follows from the nature of the fiduciary relationship created by a power of attorney, but the right is not clearly established in the case law.

Executors and trustees routinely apply to the court for direction when they are unsure of the proper course of action. Ensuring that attorneys have a similar opportunity would help prevent inadvertent abuse of authority.

Giving the courts the power to terminate a power of attorney when the attorney has been guilty of abuse is an essential reform. While it would be appropriate to allow the Public Trustee to temporarily suspend the operation of an enduring power of attorney after an investigation, the final decision to remove an attorney should lie with the courts. The Alberta *Powers of Attorney Act* is a model for codification of the court's role:

9 (1) An attorney under an enduring power of attorney may apply by originating notice for the opinion, advice or direction of the Court on any matter respecting the management or administration of the donor's property. . . .

10 (1) An application may be made to the Court by way of originating notice for an order directing an attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the enduring power of attorney . . .

(2) The application under this section may be made

(a) by the donor, the donor's personal representative or a trustee of the donor's estate, or

(b) if the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate, by any interested person . . .

11 (1) Any interested person may apply to the Court by way of originating notice for an order terminating the enduring power of attorney . . .

(3) On hearing an application under subsection (1), the Court may grant an order terminating the enduring power of attorney if the Court considers that this would be in the best interests of the donor.

(4) On granting an order terminating an enduring power of attorney, the Court shall not appoint a substitute attorney but may do one or both of the following:

(a) direct that the applicant bring an application forthwith for a trusteeship order in respect of the donor's estate;

(b) pending the application referred to in clause (a), appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.

Recommendations for Discussion

33. Enduring powers of attorney legislation should provide that, on application by a grantor, the Public Trustee, or any interested party, the court may (a) direct that the attorney give an accounting for his or her management of the grantor's property and financial affairs, and (b) upon finding that the attorney has abused his or her authority, direct that the attorney be removed or the power terminated.

34. Enduring powers of attorney legislation should provide for an application to the court by an attorney for direction.

(C) The Public Trustee

Abuse of an enduring power of attorney can come to light in several ways: (1) A friend or family member may discover evidence that an attorney is acting improperly. (2) A financial institution holding the grantor's funds may become suspicious of the attorney's activities. Banks and credit unions in Saskatchewan have recently begun to take an active role in protecting the interests of elderly and vulnerable clients. Many have officers responsible for services to senior citizens who will question and report unusual financial transactions. (3) The grantor himself or herself may complain of what appears to be unfair treatment.

Reporting of cases of abuse could be encouraged by public education and by providing legal protection for individuals and financial institutions that report cases of possible abuse in good faith. However, the primary need is an effective system for investigating complaints and taking rapid action to stop abuse when it is discovered. In some cases, a friend or relative of an attorney may have enough evidence of abuse to go directly to court to seek an accounting or termination of the power. In most cases, the kind of evidence available to a concerned friend or relative will only be sufficient to warrant further investigation.

The courts cannot fill this investigative role. What is required is an agency that can take initiative to investigate. It should have authority to demand disclosure of financial information from the attorney, financial institutions, and third parties with whom the attorney has dealt. The agency should also have authority to take immediate steps to stop abuse. It should be authorized to freeze bank accounts and to assume temporary responsibility for management of the grantor's affairs.

The *Steering Committee on the Abuse of Adults in Vulnerable Circumstances* has recommended expansion of the Public Trustee's authority to investigate abuse by court-appointed guardians. In our opinion, the problem of abuse of enduring powers is similar enough that a single investigative regime should apply to both guardians and attorneys under enduring powers of attorney.

A somewhat difficult issue is whether attorneys should be required to file annual accounts with the Public Trustee. There is merit in some system of filing with the Public Trustee. However, whether this should take the form of detailed annual financial accounts is a matter about which individuals consulted in preparing this paper disagree. Annual accounts might provide some evidence of poor management, but fraudulent attorneys will either evade filing or file misleading accounts. For honest attorneys, preparation of annual accounts would be an added demand on their time. While attorneys should of course keep financial records, any system of reporting will inevitably require completion of special forms and may require the assistance of an accountant.

The primary value of an annual filing by attorneys is perhaps not financial information, but the record it provides of active enduring powers of attorney. If a complaint is made, the annual filing will provide

information about the identity and place of residence of the grantor and attorney. This would provide a starting point for an investigation. If no filing has been made, that in itself may indicate a need to expedite the investigation.

Recommendations for Discussion

35. The Public Trustee should be authorized to investigate complaints of abuses by attorneys under enduring powers of attorney. Investigative powers should be similar to those exercised by the Public Trustee in the investigation of complaints of abuses by guardians, and should include (a) authority to demand financial disclosure from attorneys, financial institutions, and other third parties with whom the attorney has dealt, (b) authority to freeze any account in a financial institution in which money belonging to the grantor is deposited, and (c) authority to assume management of a grantor's affairs during an investigation and pending a decision to apply to the court for termination of the power of attorney.

36. Attorneys under enduring powers of attorney should be required to make an annual filing with the Public Trustee.

37. A person who makes a complaint in good faith to the Public Trustee concerning an enduring power of attorney should be protected from any liability that might arise as a result of the complaint.

5. Enduring powers of attorney for personal decisions

At present, enduring powers of attorney are used in Saskatchewan only in regard to financial decisions and property. However, there does not appear to be any legal bar to granting an attorney authority to make decisions about personal care and life-style, decisions of the sort that can be made on behalf of an incapacitated individual by a personal guardian appointed by the court. It has been suggested that "personal" enduring powers of attorney should be explicitly authorized, and even encouraged.

Saskatchewan has already taken one step toward recognition of "personal" enduring powers. Advance health care directives legislation recently adopted in Saskatchewan[21] and most other Canadian jurisdictions allows appointment of a substitute health care decision maker. The decision maker under this legislation is in effect an attorney with authority limited to health care decisions. In Nova Scotia and some American jurisdictions, the substitute health care decision maker is in fact referred to as an attorney, and the advance directive appointing the decision maker is identified as an enduring power of attorney.

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[21] *The Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001.

The traditional restriction of powers of attorney to property and financial matters is probably nothing more than a reflection of the fact that powers of attorney were originally used primarily for business purposes. If enduring powers of attorney are a useful alternative to court appointment of a property guardian, a strong case that be made that they could also be a viable alternative to appointment of a personal guardian.

Recommendation for Discussion

38. Legislation should explicitly authorize enduring powers of attorney that confer authority on the attorney to make personal care and life-style decisions on behalf of the grantor.